IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5398 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BAPALAL J. GADHVI, - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR DG CHAUHAN for Petitioner(s) : 1,
Mr. LB Dabhi AGP for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 28/02/2007

ORAL JUDGMENT

1. Heard learned Advocate Mr. DG Chauhan for the petitioner and MR. LB Dabhi, learned AGP for respondents.

2. According to the case of the petitioner, case of the petitioner is governed by the judgment and order of this court dated 20.7.2001 given in Special Civil Application no. 10532 of 1998 wherein petitioner was also one of the petitioner. According to the case of the petitioner, on the basis of the oral assurance given by the respondent auhtority, petitioner had earlier withdrawn his name from the said petition and said petition came to be disposed of qua petitioner and thereafter, respondents are not considering case of petitioner for the benefit at par to the other petitioners in SCA No. 10532 of 1998 on the basis of judgment and order of this court dated 20.7.2001 though petitioner is similarly situated employee. According to the petitioner, respondents are required to consider case of the petitioner for posting for the post of PSI. Petitioner had worked as unarmed police constable from 14.12.1979 for a period of four years, and from 1983,

petitioner worked as Head Constable Gr.I for thirteen years and from 9th January, 1996 to 2nd August, 1999, petitioner worked as Intelligence Officer which is equivalent to the post of PSI for a period of three years and seven months. It appears that he has also worked as Radio Operator (equivalent to the post of Head Constable Grade I). Petitioner is possessing requisite qualification for promotion to the post of PSI as required under the relevant rules. Petitioner had successfully passed written departmental examination, cleared oral test and had successfully completed training of four months for promotion to the post of PSI. Out of 350, 349 head constables including all juniors have been promoted to the post of PSI barring petitioner. According to the petitioner, though his case is covered by the judgment of this court in SCA NO.10532 of 1998 dated 20.7.2001, respondents are not extending those benefits to the petitioner

and he has thus been deprived of his legal and statutory right and legitimate claim of promotion to the post of PSI. Learned Advocate Mr. Chauhan appearing for the petitioner submitted that in SCA NO.10532 of 1998, after examining merits of the similarly situated employees, orders were passed by this court and case of the petitioner is required to be considered as per this Court's decision dated 20.7.2001 in SCA No.10532 of 1998. Learned Advocate Mr. Chauhan also submits that in the aforesaid petition, petitioner was a party – one of the petitioner but only because of the oral assurance given by the respondent authority, in June, 2001, prayer was made by petitioner for deleting his name from the said petition as petitioner and such permission was granted by this court and his name came to be deleted and, thereafter, respondents refused to consider his case for such promotion. It was his submission that once, if orders have been

passed by this Court in case of the other similarly situated employees, and if the case of the petitioner is governed by the said decision of the employees who are similarly situated, then, respondents are bound to extend such benefits to the other employees who are similarly situated and for such benefit, it is not necessary for petitioner to file writ petition seeking similar benefit. In support of this submission, he placed reliance on two decisions of the Hon'ble Apex Court as under:

(1) KT Veerappa & Ors. V/s. State of Karnataka reported in 2006(4) SCALE page 293.

(2) State of Karnataka & Ors. Versus C. Lalitha reported in 2006(1) Supreme 640.

3. I have considered the submissions made by the learned Advocate Mr. DG Chauhan for the petitioner as well as the learned AGP Mr. Dabhi for the State Authority. I have also perused order of this Court in SCA No.10532

of 1998 dated 20.7.2001, para 14, 16 and 18 in particular. Para 14 and 16 of the said judgment are reproduced as under:

"14. As against the aforesaid argument of Mr.Joshi, so far as applicability of the Rules of 1997 is concerned, Mr.Sinha submitted that the instant case is one of promotion and not appointment. For getting appointed, one may not have substantive right, but the same criterion may not be applicable so far as the question of promotion is concerned. He submitted that, in any case, when the Department itself has relied upon the earlier Rules for promotion regarding some of the present petitioners, no different treatment can be given by the Department by relying upon the 1997 Rules, which is only an afterthought. Reference to the said Rules of 1997 was made practically at the time of conclusion of the hearing of the matter. Even when the question of sending the candidates for training arose, it was never said by the Department that as per the New Rules, the petitioners were not eligible. Not only that, on the basis of such completion of training, promotion orders have been given in favour of others and, therefore, the Government should not discriminate the petitioners from getting the said benefit.

16. Mr.Sinha has also relied upon the decision in P. Mahendran and others v. State of Karnataka and others, (1990) 1 SCC 411. It has been observed by the Honourable Apex Court as under :

" ... ...

Every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the

> statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If a rule is expressed in a language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure.
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> ... ..."

Mr.Sinha has also relied upon the decision of the Honourable Supreme Court in Union of India and others v. Tushar Ranjan Mohanty and others, (1994) 5 SCC 450 to substantiate his case that in the case of promotion, there is a substantive right accrued in favour of a person, which cannot be denied by amendment. It has been observed in paragraphs 14 and 15 as under :-

> " ... ...
>
> The legislature and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.
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> ... ...
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> The retrospective operation of the amended Rule 13 cannot be sustained. The retrospective amendment of Rule 13 takes away the vested right of Respondent 1 and other general category candidates senior to respondents 2 to 9. Therefore, Rule 13, to the extent it has been made operative retrospectively, is unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. The retrospective operation of the rule has to be struck down.
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> ... ..."

Relying on the same, Mr.Sinha argued that when his right to be promoted had already accrued on his passing the examination, subsequently, that right cannot be taken away by relying upon the new enactment, especially when similarly situated persons were given promotion as per the old Rules.

4. After considering the merits of the similarly situated employees, this Court has also observed in para 18 and 19 of the said judgment as under:

> “18. Considering the aforesaid facts and circumstances of the case, therefore, I am of the opinion that when the Department itself has proceeded in the matter of issuing promotional orders on the basis of the selection process, which has started as per the relevant provisions in the Manual and even after the rule of 1997 came into picture, orders have been given as per the earlier Rule, no different treatment can be given to the present petitioners. It is required to be noted that ultimately if Mr.Joshi's contention is upheld, then all Head Constables Grade II who have been also promoted on the basis of the aforesaid selection, cannot be said to be eligible for appointment for the post in question. It is not in dispute that those Constables Grade II who have completed five years' experience have,in fact, been promoted even though, as per the Rules of 1997, only Head Constables who are in Grade I are eligible and Head Constable Grade II are not eligible as per the Rules. However, the Department has followed

the old Rules for making appointment to the post of P.S.I. Therefore, it seems that, rightly, the said contention was never taken earlier when replies were filed. In any case, in view of the aforesaid fact,the respondents cannot deny the benefits to the present petitioners on the ground that they are not eligible as per the 1997 Rules, especially when the Department itself has followed the old Rules for making appointment. Therefore, once the petitioners have undergone written test and oral test, along with the similarly situated candidates, the said benefit should be given to the petitioners without resorting to the Rules of 1997.

19. Considering the matter from the aforesaid angle, I am of the opinion that when the post of A.I.O. Was treated as equivalent to Head Constable Grade I and when the petitioners have continued for more than five years and it is not necessary that they should have that experience only in the parent cadre, they were entitled for consideration for promotion to the post of P.S.I. and accordingly, the petitioners were rightly called for written test and oral test. Since it is not in dispute that they have successfully come out in both the tests and ultimately, they have completed the training as per the interim order of the High Court, they are entitled to get similar treatment, like others, who were also given posting orders on the post of P.S.I., as, in my

> view, they were eligible to appear in the examination at the relevant time for P.S.I's examination, as they have completed five years' service in the cadre of Head Constable. Under these circumstances, the petition is required to be allowed and it is accordingly allowed. Rule is made absolute with no order as to costs. Since the petitioners have already been selected, now the only relief which is required to be given is regarding giving posting orders to them. The respondents are accordingly directed to give posting orders of the petitioners on the **post of P.S.I.within a period of four weeks from today.”**

5. I have also considered the two decisions of the apex court relied upon by the learned Advocate MR.D.G.Chauhan for the petitioner as aforesaid. In case of KT Veerappa & Ors. V/s. State of Karnataka reported in 2006(4) SCALE page 293, the apex court observed as under in para 16 of the judgment :

> “16. The defence of the State Government that as the appellants were not the petitioners in the writ petition filed by 23 employees of the respondent - University to whom the

benefit of revised pay scales was granted by the Court, the appellants are estopped from raising their claim of revised pay scales in the year 1992-94, is wholly unjustified, patently irrational, arbitrary and discriminatory. As noticed in the earlier part of this judgment, revised pay scales were given to those 23 employees in the year 1991 when the contempt proceedings were initiated against the Vice- Chancellor and the Registrar of the University of Maysore. The benefits having been given to 23 employees of the University in compliance with the decision dated 21/6/1989 recorded by the learned Single Judge in W.P. Nos. 21487-21506/1982, it was expected that without resorting to any of the methods the other employees identically placed, including the appellants, would have been given the same benefits, which would have avoided not only

unnecessary litigation but also the movement of files and papers which only waste public time.”

6. In case of State of Karnataka & Ors. Versus C. Lalitha reported in 2006(1) Supreme 640, the apex court observed as under :

“Important points:

Service jurisprudence evolved from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the Court that would not mean that persons similarly situated should be treated as differently.”

7. Therefore, considering the observations made by this Court in judgment dated 20.7.2001 after examining merits of the similarly situated employees and also considering the aforesaid two decisions of the Hon'ble apex court the sum and substance of which is that all persons situated similarly should be treated

similarly. Only because one person has approached the Court, that would not mean that persons situated similarly should be treated differently. In the facts of the present case, initially, petitioner herein was also a party to the aforesaid petition being SCA NO. 10532 of 1998. Subsequently, because of the oral assurance given by the respondent authority, he withdrew his name from the said petition. Thereafter, the respondent authority not considered his case as per the oral assurance and now, being similarly situated to those who were petitioners in said petitions, he is claiming relief as similarly situated person. Therefore, according to my opinion, merely because petitioner was not a party to the said petition as he had withdrawn his name from the said petitions, he cannot be treated differently and the respondents are bound to treat the petitioner similarly

at par with those who were the petitioners in SCA NO. 10532 of 1998. As submitted by the learned Advocate Mr.Chauhan, the ground on which respondents are denying such similar treatment to the petitioner is that he has withdrawn his name from the said petition and on that ground alone, petitioner has been denied the legitimate right of posting in the post of PSI. Therefore, as per the aforesaid decisions apex court, petitioner being similarly situated person, is entitled for similar treatment and for getting such similar treatment, petitioner is not required to file the writ petition for the same relief.

8. Therefore, in view of the aforesaid aspects involved in the matter and also in view of the law laid down by the Hon'ble apex court in aforesaid two decisions, and also in view of the decision of this court in SCA No. 10532

of 1998 dated 20.7.2001 wherein identically situated employees have been granted the posting in the post of PSI according to the facts which have been narrated hereinabove, petitioner herein is also entitled for the post of PSI which has been denied to him only on the ground that the petitioner not continued him as petitioner in the aforesaid petition.

9. Therefore, it is directed to the respondents to consider the case of the petitioner herein for promotion to the post of PSI in light of the directions issued by this Court in SCA NO. 10532 of 1998 dated 20th July, 2001 and examine case of the petitioner and then pass appropriate reasoned order in accordance with law while keeping in view the law laid down by the apex court in aforesaid two decisions within two months from the date of receipt of copy of this order and to communicate same to the

petitioner immediately thereafter.

10. With these observations and directions, this petition is disposed of at this stage without expressing any opinion on merits of the matter and with a liberty in favour of the petitioner to challenge the orders that may be made by respondents before the appropriate forum in accordance with law if the orders made by the respondents are adverse to the petitioner.

11. Direct Service is Permitted.

(H.K. Rathod,J.)

Vyas